

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TROY X. KELLEY,

Defendant.

CASE NO. CR15-5198 RBL

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
CONSOLIDATION AND AN  
EVIDENTIARY HEARING

DKT. #58

THIS MATTER comes before the Court on Defendant Troy Kelley's Motion for Consolidation and an Evidentiary Hearing [Dkt. # 58]. In April 2015, the government indicted Kelley for possession of stolen funds and money laundering. It subsequently commenced a miscellaneous proceeding to obtain an *ex parte* civil seizure warrant from U.S. Magistrate Judge Brian Tsuchida, in Seattle. The government seized \$908,397.51 from Kelley's former counsel's trust account.

1 Kelley challenges the seizure, and asks this court to consolidate this criminal case and the  
 2 Seattle miscellaneous case. He also seeks an evidentiary hearing on whether the government had  
 3 probable cause to seize the funds. He argues the two proceedings involve the same property and  
 4 facts, and that the Court must hold an evidentiary hearing under Civil Rule 65 to determine  
 5 whether the government had probable cause to seize his property.

6 The government argues that a civil forfeiture proceeding is the proper venue to dispute its  
 7 seizure of Kelley's assets, even if the court delays the proceeding until after Kelley's criminal  
 8 trial. And until it commences such a proceeding, there is nothing for the Court to consolidate.  
 9 Even then, it opposes consolidation, arguing that its legal theories in the cases are similar, but not  
 10 identical.

11 The government has engaged Kelley in an elaborate chess match. While this Court will  
 12 not obstruct the government's ply,<sup>1</sup> it will ensure the case proceeds in accordance with the  
 13 Constitution.

## 14 I. DISCUSSION

15 Kelley was indicted in April 2015. On September 2, 2015, the United States Attorney's  
 16 Office obtained an *ex parte* warrant from U.S. Magistrate Judge Tsuchida to seize \$908,397.51  
 17 from a trust account held by Kelley's former counsel, Davis Wright Tremaine. *See In Re: The*  
 18 *sum of \$908,397.51 in United States Funds Contained in Bank of America Trust Account No.*  
 19 *xxxxxxx3414*, Dkt. #1 (Misc. Case No. 15-129 BAT W.D. Wa).

20 The government espoused a theory in the affidavit supporting its warrant request different  
 21 than the theory it later presented to the grand jury. FBI Special Agent Michael Brown averred in  
 22 his affidavit that a FBI accountant traced this trust money from a wire transfer to Kelley's  
 23 \_\_\_\_\_

24 <sup>1</sup> A ply is a move by one opponent in a chess match.

1 alleged money laundering proceeds: converted, non-refunded reconveyance fees and wire fraud  
 2 proceeds totaling approximately \$1,463,171 in stolen funds. [Dkt. #64, Exhibit A at 25]. Brown  
 3 claimed Kelley's comingled \$908,397.51 was subject to forfeiture under 18 U.S.C. §  
 4 981(a)(1)(A),<sup>2</sup> which makes any property involved in a money laundering transaction in  
 5 violation of 18 U.S.C. § 1956 subject to civil forfeiture. Brown cited *United States v. Baker*, 227  
 6 F.3d 955, 967-70 (7th Cir. 2000), for the proposition that the term "involved in" includes not just  
 7 the \$1,463,171 in stolen proceeds but also the \$908,397.51 and any other property allegedly used  
 8 to facilitate Kelley's alleged laundering.

9 In a superseding indictment filed the next day, the government used an alternative theory  
 10 to charge Kelley with a number of crimes and to set forth two forfeiture actions. [Dkt. #38.]  
 11 Count 1 charges him with possession and concealment of stolen property in violation of 18  
 12 U.S.C. § 2315. *Id.* at 30. If convicted, Kelley must forfeit all property that constitutes or is  
 13 derived from proceeds traceable to this offense under 18 U.S.C. § 981(a)(1)(C). The government  
 14 contends this property is the approximately \$1,463,171 of stolen proceeds.

15 Counts 6-10 charge Kelley with money laundering designed to conceal and disguise the  
 16 nature, location, source, ownership, and control of his allegedly fraudulent proceeds. *Id.* at 37-40.  
 17 If convicted for money laundering in violation of 18 U.S.C. § 1956, Kelley must forfeit any  
 18 property involved in or traceable to such an offense under 18 U.S.C. § 982(a)(1), which governs  
 19 criminal forfeiture. This property allegedly includes \$447,421.00 that Kelley paid to the United  
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 21  
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23 <sup>2</sup> See CIVIL ASSET FORFEITURE REFORM ACT OF 2000, PL 106-185, April 25,  
 24 2000, 114 Stat 202.

1 States Treasury in anticipation of his 2016-20 taxes and the \$908,397.51 held in trust by Davis  
2 Wright.<sup>3</sup>

3 On September 8, 2015, the government executed its warrant, seizing the \$908,397.51.<sup>4</sup>  
4 The government used Section 981 (civil forfeiture) to seize it as laid out in Brown's affidavit,  
5 rather than Section 982 (criminal forfeiture) as charged in its superseding indictment.

6 The parties debate whether the Court should examine the propriety of this civil seizure.  
7 Kelley seeks an immediate evidentiary hearing for review of the government's *ex parte* seizure  
8 of his assets. The government contends that he is not entitled to a pre-trial evidentiary hearing for  
9 two reasons. It argues that statutory law and the Supplemental Rules require only a civil  
10 forfeiture proceeding, which it plans to commence on or before December 2, 2015.<sup>5</sup> It further  
11 argues that an exception permitting hearings before a civil forfeiture proceeding—a showing of a  
12 substantial basis to question the magistrate judge's probable cause finding and demonstrable  
13 financial hardship such that one's Sixth Amendment rights would be jeopardized—does not  
14 apply to Kelley.

15 From the outset, the government's tactics present due process concerns. The government,  
16 wrongly or rightly, seized Kelley's assets under Section 981. If the government had seized the  
17 money under Section 982, as charged in the superseding indictment, it would have had to  
18 demonstrate to Judge Tsuchida that a seizure was necessary to assure the property's availability  
19 for forfeiture. *See* 18 U.S.C. § 982(b)(1); *see also* 21 U.S.C. § 853(f). The government likely

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21 <sup>3</sup> The superseding indictment also claims that if Kelley is convicted and the property  
22 identified is no longer available as a result of his acts or omissions, Kelley owes substitute  
property under 21 U.S.C. § 853(p). *Id.* at 47-8.

23 <sup>4</sup> Kelley's former counsel, Mark Bartlett, represented in May 2015 that Davis Wright  
would not touch this money held in trust unless ordered to do so by a court. [Dkt. #28].

24 <sup>5</sup> The government's Response suggests it will request a stay until completion of Kelley's  
criminal trial. [Dkt. #64].

1 could not have satisfied this burden because Kelley had agreed to a standstill and,  
 2 notwithstanding the agreement, his former counsel had promised not to touch the assets held in  
 3 trust unless ordered to do so by the Court. [Dkt. #28]. Similarly, if the government had sought to  
 4 restrain, not seize, Kelley's assets under Section 981, he would have been afforded a prompt  
 5 adversarial hearing. *See* 18 U.S.C. § 983(j). At such a hearing, the government would have  
 6 needed to show a likelihood that the property would be unavailable for forfeiture. *See id.*

7 The Court, cognizant of the inconsistent applicability of these procedural protections,  
 8 first considers whether due process requires Kelley receive a post-seizure pre-criminal trial  
 9 hearing. If so, it must determine whether to consolidate the miscellaneous seizure action filed in  
 10 Seattle (2:15-ms-00129) and the government's forthcoming civil forfeiture action with Kelley's  
 11 criminal case (3:15-cr-05198RBL). And third, which rules would govern such a hearing.

12 **A. Due Process Requires Kelley Receive a Post-Deprivation Hearing Prior to his**  
 13 **Criminal Trial Involving His Seized Assets.**

14 Kelley argues that he is entitled to an evidentiary hearing under Civil Rule 65. He argues  
 15 that in the Ninth Circuit, courts must provide defendants with a pretrial opportunity to challenge  
 16 the seizure and restraint of their assets to avoid a deprivation of their Fifth Amendment due  
 17 process rights.

18 The government responds that the Ninth Circuit case law cited by Kelley is inapposite,  
 19 because it concerns criminal restraints of assets, not civil seizures. It argues that the procedural  
 20 rules governing civil forfeitures apply instead, and they do not afford Kelley a pre-trial, post-  
 21 seizure evidentiary hearing outside of a civil forfeiture proceeding.

22 "Procedural due process imposes constraints on governmental decisions which deprive  
 23 individuals of ... 'property' interests within the meaning of the Due Process Clause of the Fifth  
 24 or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976). It

1 fundamentally requires the opportunity to be heard at a meaningful time and in a meaningful  
 2 manner. *See Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187 (1965) (citing *Grannis v.*  
 3 *Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783 (1914)). This constitutional right protects an  
 4 individual from substantively unfair or mistaken seizures of his property by ensuring that the  
 5 government follows a fair process when it deprives him of his property. *See Fuentes v. Shevin*,  
 6 407 U.S. 67, 81, 92 S. Ct. 1983 (1972).

7 Courts have generally held that a pretrial seizure of forfeitable assets does not violate a  
 8 defendant's Fifth Amendment rights. *See United States v. Unimex, Inc.*, 991 F.2d 546, 550 (9th  
 9 Cir. 1993). Due process, though, is not a technical conception with a fixed content unrelated to  
 10 time, place, and circumstances. *See Mathews*, 424 U.S. at 334 (citing *Cafeteria Workers v.*  
 11 *McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743 (1961)). Rather, it calls for such procedural  
 12 protections as the particular situation demands. *See id.* (citing *Morrissey v. Brewer*, 408 U.S.  
 13 471, 481, 92 S. Ct. 2593 (1972)). The Supreme Court has explicitly reserved the question of  
 14 whether a pretrial seizure based on a finding of probable cause violates the Due Process Clause  
 15 when the defendant is not granted a hearing. *See United States v. Monsanto*, 491 U.S. 600, 615 n.  
 16 10, 109 S. Ct. 2657 (1989). Thus, this Court must determine whether due process demands  
 17 Kelley receive an evidentiary hearing prior to his criminal trial, instead of the delayed civil  
 18 forfeiture proceedings that the government proffers as proper.

### 19 **1. Civil Seizure and Forfeiture Proceedings.**

20 18 U.S.C. § 981, 983 work with the Supplemental Rules to govern civil seizures and  
 21 forfeiture proceedings. The government seized Kelley's property under 18 U.S.C. § 981. This  
 22 section explains that the government must obtain a seizure warrant in the same manner as a  
 23 search warrant under the Criminal Rules. *See* 18 U.S.C. § 981(b)(2). It also explains that a court  
 24

1 shall issue a stay if it determines that civil discovery will adversely affect the ability of the  
 2 government to investigate or prosecute a related criminal case. *See* 18 U.S.C. § 981(g)(3). Lastly,  
 3 Section 981 permits a claimant to make a motion for the return of his property, although it fails  
 4 to lie out further instruction. *See id.* at (b)(3). Presumably, one makes this motion in accordance  
 5 with Section 983.

6 Section 983 offers details about civil forfeiture proceedings. Under this section, the  
 7 government has 90 days after seizing one's property either to file a complaint commencing a  
 8 civil forfeiture proceeding or to return the property. *See* 18 U.S.C. § 983(a)(3)(A). During this  
 9 forfeiture proceeding, the government bears the burden of proof. It must establish by a  
 10 preponderance of the evidence that the property is subject to forfeiture and that there is a  
 11 substantial connection between the property and the offense. *See id.* at (c). A claimant in a civil  
 12 forfeiture proceeding may petition for the release of his property, so long as the property does  
 13 not constitute contraband, currency, or electronic funds. *See* 18 U.S.C. § 983(f)(8).<sup>6</sup>

14 The Supplemental Rules comprehensively present the rules for forfeiture actions *in rem*  
 15 arising from a federal statute.<sup>7</sup> *See* 18 U.S.C. § 983(a)(3). Supplemental Rule G specifically  
 16 governs forfeiture actions, and to the extent that it fails to address an issue, Supplemental Rules  
 17 C and E and the Federal Rules of Civil Procedure apply. *See* Fed. R. Civ. P., Supp. R. G(1).  
 18 Supplemental Rule G requires a court to make a probable cause finding that the property to be  
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 21 <sup>6</sup> Those whose property is restrained, a less severe action than a seizure, are offered a  
 22 hearing at the earliest possible time under 18 U.S.C. § 981(j). The Court questions the reasoning  
 23 behind this distinction, because whether the government seeks a seizure warrant or a restraining  
 24 order, the court must make the same preliminary determination: that probable cause exists to  
 conclude the property is subject to forfeiture. *See* 18 U.S.C. § 981(b)(3).

<sup>7</sup> Enacted after CAFRA, Supplemental Rule G applies to actions governed by CAFRA  
 and to those excluded from it. *See* Stefan D. Cassella, *Asset Forfeiture Law in the United States*  
 240 (2nd ed. 2013).

1 seized is subject to forfeiture before issuing the government an arrest warrant, similar to  
2 Criminal Rule 41 and 18 U.S.C. § 981(b)(2). *See id.* at (3)(b). It also allows a claimant to petition  
3 for the release of his property under 18 U.S.C. § 983(f), *see id.* at 8(d); this section, however,  
4 continues to exclude those whose property constitutes contraband, currency, or electronic funds  
5 from petitioning for the immediate release of their property. *See* 18 U.S.C. § 983(f)(8).

6 Supplemental Rule E declares that a claimant is entitled to a prompt hearing at which the  
7 government must show why the court should not vacate the arrest. This section does not apply to  
8 forfeitures resulting from violations of statutory law. *See* Fed. R. Civ. P., Supp. R. E(4)(f).  
9 Section C does not make any motions available to a claimant. Consequently, Sections 981 and  
10 983 and the Supplemental Rules do not provide an individual deprived of his money a hearing  
11 evaluating the validity of his deprivation prior to a civil forfeiture proceeding.

## 12 2. Constitutional Sufficiency.

13 The government argues Kelley is not entitled to a hearing because a civil forfeiture  
14 proceeding, even if stayed, would satisfy due process. It cites three cases decided by federal  
15 judges sitting in New York for this proposition. *See United States v. Any and All Funds on*  
16 *Deposit in Account Number 0139874788, at Regions Bank, Held in the Name of Efans Trading*  
17 *Corp., et al.*, 2015 WL 247391 (S.D. N.Y. Jan. 20, 2015); *In re The Premises Known and*  
18 *Described as 100 Sweeneydale Ave.*, 2015 WL 3607572 (E.D. N.Y. June 6, 2015); *In Re the*  
19 *Seizure of Any and All Funds on Deposit in Wells Fargo Bank, NA Account Number xxxxxxxx,*  
20 *Held in the Name of Roger and Sons, Inc.*, 25 F. Supp. 3d 270 (E.D. N.Y. 2014). In each of these  
21 cases, the district courts denied the defendants' requests for a probable cause hearing, reasoning  
22 that the civil forfeiture proceeding satisfied due process.



1 The Court will not follow these cases for two reasons. First, none of them involved an  
2 intertwined criminal action that would cause a stay of the civil forfeiture proceeding,  
3 significantly delaying the claimant's opportunity to be heard. In this regard, the Court cannot  
4 outright accept the conclusion that a pre-criminal trial hearing would be a superfluous procedural  
5 protection. *See Efans*, 2015 WL 247391, at \*14; *see also Sweeneydale*, 2015 WL 3607572, at  
6 \*10-11; *Roger and Sons*, 25 F. Supp. 3d at 279-80.

7 Second, *Efans* and *Sweeneydale* relied upon the Supreme Court's *Kaley* decision to  
8 conclude the claimants had "no right to relitigate the [magistrate judge's] probable cause  
9 finding" for the issuance of a seizure warrant. *See Efans*, 2015 WL 247391, at \*14 (citing *Kaley*  
10 *v. United States*, 134 S. Ct. 1090, 1105 (2014)); *see also Sweeneydale*, 2015 WL 3607572, at  
11 \*10-11. *Kaley* announces that claimants are not entitled to challenge a grand jury's probable  
12 cause determination at a post-restraint pre-trial hearing. *See Kaley*, 134 S. Ct. at 1105. Because  
13 courts commonly review magistrate judges' issuances of warrants, this Court disagrees that  
14 *Kaley* prohibits courts from reviewing a magistrate judge's probable cause determination when a  
15 defendant never had an opportunity to litigate the warrant's merits. *See United States v. Johns*,  
16 948 F.2d 599, 602 (9th Cir. 1991) (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317,  
17 (1982)).

18 Thus, this Court must determine whether a significantly delayed civil forfeiture  
19 proceeding satisfies due process, or if a post-seizure pre-criminal trial hearing is needed. The  
20 Supreme Court outlined three factors courts should consider when assessing the constitutional  
21 sufficiency of procedural protections under the Due Process Clause: (1) the private interest at  
22 stake, (2) the burden the requested procedure would impose on the government, and (3) the  
23 probable value of the additional safeguard as compared to the risk of an erroneous deprivation  
24

1 without it. *See Mathews*, 424 U.S. at 335. The Court must therefore balance Kelley's interest in  
 2 the prompt return of his seized \$908,397.51 that his former counsel was holding in trust, the  
 3 burden an expedited post-seizure hearing would impose on the government, and the probable  
 4 value of this additional safeguard versus the risk of an erroneous deprivation without it. *See*  
 5 *Mathews*, 424 U.S. at 335.

6 First, Kelley's interest in the prompt return of his nearly \$1 million is great. The  
 7 government's briefing suggests it will request a stay of the forthcoming civil forfeiture  
 8 proceeding pending resolution of Kelley's criminal case. A stay would thereby delay resolution  
 9 of the validity of the government's pre-trial seizure of his assets by approximately one year, if  
 10 such a hearing ever takes place.<sup>8</sup> The potentiality exists that resolution of Kelley's criminal case  
 11 could moot his civil forfeiture proceeding if a jury concluded an underlying crime subjecting the  
 12 proceeds to forfeiture had occurred. *See Unimex*, 991 F.2d at 551.

13 Second, an expedited hearing should not impose too great of a burden on the government  
 14 because it already made a probable cause argument before Judge Tsuchida, albeit *ex parte*.

15 Third, a court could conclude probable cause did not exist for the government to seize Kelley's  
 16 money if it agrees with Kelley's rendition of the facts of law. Kelley argues the seized funds are  
 17 neither tainted nor traceable to the alleged underlying crime. And even if they were, they are not  
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19  
 20 <sup>8</sup> To assess whether a delay in the commencement of civil forfeiture proceedings  
 21 specifically is reasonable, courts balance four factors: (1) the length of the delay; (2) the reason  
 22 for the delay, (3) the claimant's assertion of his right to a judicial hearing, and (4) any prejudice  
 23 to him. *See United States v. Eight Thousand Eight Hundred and Fifty Dollars In United States*  
 24 *Currency*, 461 U.S. 555, 564, 103 S. Ct. 2005 (1983) (citing *Barker v. Wingo*, 407 U.S. 514, 92  
 S. Ct. 2182 (1972)). While the Court is not tasked with evaluating the reasonableness of a  
 delayed forfeiture proceeding at this time, this test demonstrates the unreasonableness of  
 delaying Kelley a hearing, no matter the form: the delay is substantial, he has asserted his right to  
 a hearing, and the possibility exists that the government seeks the delay for tactical reasons, so it  
 can pursue alternative laundering theories.

1 forfeitable because he cannot be convicted of money laundering, since the statute of limitations  
2 has already expired. He also argues that the truthfulness of the affidavit supporting the  
3 government's seizure warrant request is highly suspect because the FBI accountant who  
4 performed the financial tracing analysis is under investigation. An immediate adversarial hearing  
5 will resolve these allegations, thereby greatly decreasing the risk of an erroneous and prolonged  
6 deprivation of Kelley's assets.

7 Therefore, due process demands Kelley receive an evidentiary hearing prior to his  
8 criminal trial. The Court concludes that a significantly delayed forfeiture proceeding will not  
9 present an adequate remedy under the law because it fails to provide Kelley with a meaningful  
10 opportunity to be heard at a meaningful time, as due process requires. *See Manzo*, 380 U.S. at  
11 552.

12 **B. The Miscellaneous Seizure/Forfeiture Action is Transferred to this Court and**  
13 **Consolidated with Kelley's Criminal Case, Subject to Possible Bifurcation.**

14 Kelley asks the Court to consolidate the seizure review/forthcoming civil forfeiture action  
15 with his ongoing criminal case because both actions involve the same property and factual  
16 subject matter. He also argues that consolidation would enable the Court to manage and  
17 scrutinize the government's forfeiture actions.

18 The government concedes that once it files a civil forfeiture action on or before  
19 December 2, 2015, it will support a transfer of that related case to this court; however, it argues  
20 against consolidation because its civil and criminal cases against Kelley propound different  
21 forfeiture theories and focus on different money-laundering transactions. The government argues  
22 that the Court should keep the cases separate because different rules will apply to each  
23 proceeding.  
24

1 A district court may transfer any civil action to any other district or division where the  
 2 plaintiff could have filed the case for the convenience of the parties and in the interest of justice.  
 3 *See* 28 U.S.C. § 1404. Because the government could have filed its request for a seizure warrant  
 4 in Tacoma and due process requires Kelley receive a post-seizure hearing prior to his criminal  
 5 trial involving the same funds, Miscellaneous Case No.15-129 is REOPENED AND  
 6 TRANSFERRED to this Court in the interest of justice. *See* 18 U.S.C. § 981(b)(3); *see also*  
 7 *United States v. Certain Real Property*, 972 F.2d 136 (6th Cir. 1992) (acknowledging that the  
 8 district court consolidated the criminal and civil forfeiture actions). The Court therefore takes  
 9 jurisdiction over the related forthcoming civil forfeiture action.

10 Consolidation is appropriate under Civil Rule 42 when actions before the Court involve a  
 11 common question of law or fact. The Court has discretion as to whether it joins any or all matters  
 12 at issue in the actions. *See* Fed. R. Civ. P. 42. Because the seizure/forfeiture action and the  
 13 criminal case involve the same property and similar charges, these proceedings are  
 14 CONSOLIDATED, although the Court may later bifurcate them.

15 **C. Ninth Circuit Case Law Indicates Criminal Rule 41(g) Governs Pre-trial Hearings**  
 16 **for the Return of Assets that the Government Has Seized with a Civil Warrant.**

17 Accordingly, the parties' dispute reduces to which rule will govern the pre-criminal trial  
 18 adversarial hearing. Kelley argues that *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985),  
 19 and *United States v. Roth*, 912 F.2d 1131 (9th Cir. 1990), are analogous to his circumstances, and  
 20 so dictate that Civil Rule 65 should govern his evidentiary hearing. The government argues that  
 21 *Unimex*, in which the defendant corporation appealed the denial of its Criminal Rule 41(g)  
 22 motion, controls instead. It does not suggest Kelley should have styled a Rule 41(g) motion, but  
 23 it does allege that *Unimex* requires a two-part showing, which Kelley cannot satisfy, before a  
 24 court can hold a pre-trial hearing.

1        *Crozier* and *Roth* each involve the restraint of a defendant's assets under 21 U.S.C. § 853  
2 (criminal forfeitures). *Crozier* was charged with engaging in a continuing criminal enterprise, the  
3 penalties for which include forfeiture of all profits obtained through that alleged criminal  
4 enterprise. *See Crozier*, 777 F.2d at 1382. A district court granted the government's *ex parte*  
5 motion for a restraining order. *See id.* On appeal, the Ninth Circuit concluded that the district  
6 court had failed to hold a hearing on the validity of the government's restraining order, because  
7 under Civil Rule 65, an immediate hearing should take place whenever the court grants a  
8 temporary restraining order *ex parte*. *See id.* In light of developments in the case law, the  
9 Supreme Court later vacated this decision and remanded the case to the Ninth Circuit for further  
10 consideration. *See id.*

11        Before the Ninth Circuit reconsidered the case, Congress enacted the Comprehensive  
12 Crime and Control Act of 1984, which adds criminal forfeiture provisions to the act under which  
13 *Crozier* was indicted. *See id.* This Act provides that upon the government's application, a court  
14 may enter a restraining order against property that may be subject to forfeiture under federal drug  
15 laws. *See* 21 U.S.C. § 853.

16        The Ninth Circuit held on remand that the Act's forfeiture provisions do not satisfy due  
17 process: "We believe that the absence of any hearing on the imposition of a restraining order on  
18 a defendant's property, or a hearing for parties with a third party interest which takes place  
19 months or years after a restraining order is issued, cannot be construed as a hearing provided at a  
20 meaningful time. The risk of an erroneous deprivation under these procedures is high." *See id.* at  
21 1384. Concluding that 21 U.S.C. § 853 fails to protect the rights of defendants and third parties,  
22 the Ninth Circuit again ordered the district court to hold a hearing in accordance with Civil Rule  
23 65. *See id.*

1 In *Roth*, the Ninth Circuit affirmed its *Crozier* decision. *See* 912 F.2d at 1133. It again  
2 explained that in the absence of valid procedural guidelines in 21 U.S.C. § 853's forfeiture  
3 provisions, an *ex parte* pre-trial restraining order cannot ripen into a constitutional preliminary  
4 injunction unless a district court promptly holds a hearing and determines that the government  
5 demonstrated probable cause on the merits of its forfeiture claim. *See id.* at 1132-33.

6 *Unimex*, however, involves the civil seizure of assets under 18 U.S.C. § 981—the same  
7 statute under which the government seized Kelley's money. 991 F.2d 546. The government  
8 charged Unimex, Inc. with conspiring to launder drug money and failing to file currency  
9 transaction reports and seized all of its assets prior to trial under 18 U.S.C. § 982(a)(1). *See id.* at  
10 547-48. The government then filed a parallel civil forfeiture action under 18 U.S.C. § 981 for  
11 substantially the same conduct. *See id.* at 548. The criminal and civil proceedings were before  
12 different judges in the same district. *See id.* at 550.

13 Unimex moved for the return of its allegedly untainted assets (\$100,000 of the  
14 \$2,000,000 seized) so that it could retain counsel. *See id.* It provided the district court overseeing  
15 its criminal case with an affidavit from its bookkeeper, swearing that it had engaged lawfully in  
16 its business activities. *See id.* The government responded that in its affidavit submitted *ex parte*  
17 in support of the seizure, its agent had sworn that Unimex was a front for money laundering. *See*  
18 *id.* The district court denied the motion on its belief that Unimex needed to make its motion  
19 before the civil forfeiture judge. *See id.* The civil forfeiture judge then denied Unimex's motion  
20 without explanation. *See id.*

1 The Ninth Circuit explained that under Criminal Rule 41,<sup>9</sup> either judge in the district  
 2 could have properly considered whether Unimex was entitled to relief, and if the matter turned  
 3 on a disputed factual issue, permitted Unimex to present evidence at a hearing scheduled before  
 4 commencement of the criminal case. *See id.* at 551. The Circuit also announced the standard  
 5 district courts should use when making such a determination: “[T]he court must decide whether  
 6 the moving papers filed, including affidavits, are sufficiently definite, specific, detailed, and  
 7 nonconjectural, to enable the court to conclude that a substantial claim is presented.” *Id.* (quoting  
 8 *Cohen v. United States*, 378 F.2d 751, 761 (9th Cir. 1967), *cert. denied*, 389 U.S. 897, 88 S. Ct.  
 9 217 (1967) (internal quotations omitted). “If the allegations are sufficient, and factual issues are  
 10 raised, a hearing is required.” *Id.* After concluding that Unimex had been denied due process of  
 11 law under the Fifth Amendment and the right to counsel under the Sixth Amendment, the Ninth  
 12 Circuit reversed Unimex’s conviction. *Unimex*, 991 F.2d 546.

13 The Court agrees with the government that *Unimex* aligns with this case more closely  
 14 than *Crozier* and *Roth* do. Unimex involves the issuance of a civil seizure warrant under Title 18  
 15 of the United States Code, whereas *Crozier* and *Roth* involve criminal forfeiture proceedings  
 16 under Title 21 where the defendant’s assets were temporarily restrained, not seized. Therefore, if  
 17 Kelley has satisfied the requirements of a Criminal Rule 41(g) motion for the return of his  
 18 property, the Court will grant him an evidentiary hearing.<sup>10</sup>

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20 <sup>9</sup> Unimex made a Criminal Rule 41(e) motion. The Federal Rules Advisory Committee  
 21 restyled Rule 41(e) as 41(g) in 2002.

22 <sup>10</sup> Criminal Rule 41(g) cannot govern a civil forfeiture proceeding. *See Fed. R. Crim. Pro.*  
 23 1(a)(5)(B); *see also United States v. Ibrahim*, 522 F.3d 1003 (9th Cir. 2008) (ratifying a district  
 24 court’s decision to treat a Criminal Rule 41(g) motion as a civil complaint when no criminal  
 proceedings were pending at the time of filing). It can, however, govern a pre-trial hearing of a  
 civil seizure where the only action pending is a criminal forfeiture. *See United States v. Kramer*,  
 No. 1:06CR200-ENV-CLP, 2006 WL 3545026 (E.D.N.Y. Dec. 8, 2006); *United States v.*

1       **1. Kelley has Made the Required Criminal Rule 41(g) Showing.**

2       Although not styled as a Criminal Rule 41(g) motion, Kelley presents detailed arguments  
 3 for why his assets are not contraband subject to forfeiture. He first argues that simple arithmetic  
 4 demonstrates the seized \$908,397.51 cannot be traced to the \$1,463,171 in stolen funds,  
 5 challenging the government's reading of what it may seize under 18 U.S.C. § 981. He similarly  
 6 argues that the government seized substitute, not traceable, property in contradiction of *United*  
 7 *States v. Ripinsky*, which prohibits the government from restraining substitute assets under 21  
 8 U.S.C. § 853(3) prior to a conviction decision and which he argues applies here. *See* 20 F.3d  
 9 359, 365 (9th Cir. 1994) (defining substitute assets as property that is subject to forfeiture if,  
 10 upon conviction, the defendant's assets connected to the underlying crime are unreachable).  
 11 Kelley also argues that the FBI's accounting analysis is highly suspect, because the accountant  
 12 responsible for tracing Kelley's money is involved in two outstanding tax investigations. For  
 13 these reasons, he claims the government cannot sustain a probable cause finding for its seizure.

14       Citing a case decided by a district court in Idaho, *United States v. Swenson*, 2013 WL  
 15 3322632 (D. Idaho July 1, 2013), the government responds that Kelley has not made the two-part  
 16 showing it alleges *Unimex* requires before a court may hold a Criminal Rule 41(g) hearing. The  
 17 government claims Kelley cannot show both financial need and that he has established a  
 18 substantial basis on which he can question Judge Tsuchida's finding of probable cause to issue a  
 19 warrant.

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 23 *Martin*, 460 F. Supp. 2d 669 (D. Md. 2006); *United States v. Schmitz*, 153 F.R.D. 136 (E.D. Wis.  
 24 1994). Because the government has commenced criminal forfeiture proceedings but not civil  
 forfeiture proceedings, Kelley may challenge the validity of the civil seizure warrant under  
 Criminal Rule 41(g).



1 In *Swenson*, the court considered whether *Crozier* and *Roth* required the government to  
2 move for a prompt pre-trial hearing under Civil Rule 65 after it had seized Swenson's financial  
3 assets under Section 982. *See* 2013 WL 3322632, at \*6. The government charged Swenson with  
4 securities, wire, mail, and bank fraud; interstate transportation of stolen property; and multiple  
5 counts of conspiracy to commit fraud and money laundering. *See id.*, at \*1. It obtained a criminal  
6 seizure warrant from a magistrate judge based on an application and affidavit of an IRS criminal  
7 investigation special agent. *See id.* The magistrate judge concluded that the government had met  
8 its burden on establishing probable cause to believe that the assets being seized were subject to  
9 forfeiture because each account held funds traceable in whole or in part to Swenson's real estate  
10 investment company, an alleged money laundering front. *See id.*, at \*2. She also concluded that  
11 the funds may not be available for forfeiture unless seized preemptively. *See id.* Swenson moved  
12 to dissolve the government's seizure warrants, arguing that the government had failed to hold a  
13 probable cause hearing under Civil Rule 65. *See id.*, at \*3.

14 The district court held in its July 1, 2013 order that under *Unimex*, Swenson needed to  
15 make two showings to receive a pre-trial hearing. *See id.*, at \*7-8. It explained he needed to show  
16 that a substantial basis existed to question the magistrate judge's probable cause finding that his  
17 assets may be subject to forfeiture and that he did not have sufficient unrestrained assets to fund  
18 counsel of his choice. *See id.* at 7. The court explained that this "financial showing requirement  
19 is grounded in the Sixth Amendment right to retain counsel of choice. *See id.*

20 The district court reconsidered its order and clarified it on July 16, 2013. The court  
21 explained that a party moving for a Criminal Rule 41(g) hearing need not make any showing that  
22 he needs the seized funds to pay for counsel. *See United States v. Swenson*, 2013 WL 4782134,  
23 \*3 (D. Idaho Sept. 5, 2013). Rather, the movant must allege facts that, if proved, would justify a  
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1 grant of relief—the return of his property. *See id.* (citing *U.S. v. King*, 528 F.2d 68, 69 (9th Cir.  
2 1975)). This Court agrees with the Idaho district court and disagrees with the government;  
3 *Unimex* does not require a two-part showing under Criminal Rule 41(g) when a defendant only  
4 asserts a violation of his Fifth Amendment rights.

5 Indeed, Criminal Rule 41(g) provides that a “person aggrieved by an unlawful search and  
6 seizure of property or by the deprivation of property may move for the property’s return.” So  
7 long as the movant raises factual issues and his allegations are nonconjectural, the court will  
8 consider (1) whether the moving party is entitled to lawful possession of the seized property, (2)  
9 whether the government needs the property as evidence, (3) whether the property is contraband,  
10 and (4) whether the property is subject to forfeiture. *See Unimex*, 991 F.2d at 551; *see also*  
11 *United States v. Fitzen*, 80 F.3d 387, 388 (9th Cir. 1996). And it must receive evidence on any  
12 factual issue necessary to decide the motion. *See Fed. R. Crim. Pro. 41(g)*. The movant bears the  
13 burden of showing he is entitled to the property. *See United States v. Van Cauwenberghe*, 934  
14 F.2d 1048, 1061 (9th Cir.). If the court grants his motion, it must return the property to him but  
15 may impose reasonable conditions in order to protect access to the property or its use in later  
16 proceedings. *See id.*

17 Kelley has alleged “sufficiently definite, specific, detailed, and nonconjectural” facts to  
18 enable the Court to conclude that he has presented a substantial claim that he is entitled to the  
19 prompt return of his property. *See Unimex*, 991 F.2d at 551 (9th Cir.1993). First, it is undisputed  
20 that Davis Wright was holding the \$908,397.51 in trust for Kelley. Second, the government does  
21 not need to possess the electronic funds for evidence (nor does it have a justifiable concern that  
22 Davis Wright will move the money, making it unavailable for forfeiture). Third and fourth,  
23 Kelley has put forth detailed arguments for why his \$908,397.51 is not contraband subject to  
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1 forfeiture: the government seized money it could not lawfully reach prior to conviction and it  
 2 lacked probable cause for the seizure.<sup>11</sup> Resultantly, this Court will evaluate the merits of his  
 3 arguments at a prompt adversarial hearing.

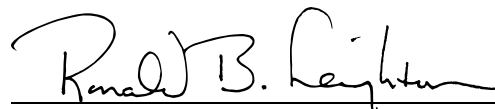
## 4 II. CONCLUSION

5 Due process requires Kelley receive a meaningful opportunity to be heard at a  
 6 meaningful time. A significantly delayed civil forfeiture proceeding cannot satisfy this  
 7 constitutional threshold. Because Kelley has sufficiently presented a claim that the government  
 8 may have improperly seized his \$908,397.51 *ex parte*, he must promptly receive an evidentiary  
 9 hearing.

10 Accordingly, Defendant's Motion to Consolidate is GRANTED.  
 11 Miscellaneous Case No.15-129 is REOPENED and TRANSFERRED to this Court, along with  
 12 the government's related forthcoming civil forfeiture action. [Dkt. #58]. Defendant's Motion for  
 13 an Evidentiary Hearing is also GRANTED. [Dkt. #58]. On Monday, December 1, 2015 and  
 14 December 2, the Court will hold a hearing to assess the validity of the government's September  
 15 8, 2015 seizure and any severance arguments. Criminal Rule 41(g) will govern the hearing's  
 16 evidentiary portion.

17 IT IS SO ORDERED.

18 Dated this 29<sup>th</sup> day of October, 2015

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20 Ronald B. Leighton  
 21 United States District Judge

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22 <sup>11</sup> Even though claimants are not entitled to challenge a grand jury's probable cause  
 23 determination under *Kaley*, Kelley claims he is entitled to challenge Judge Tsuchida's *ex parte*  
 24 probable cause determination because the government did not present Judge Tsuchida with the  
 same tracing theory as it presented to the grand jury. 134 S. Ct. at 1105.